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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

KENNETH R. BOYD,

Plaintiff and Appellant,

v.

MARTHA MARSH, as Trustee, etc.,

Defendant and Respondent.

F077683

(Super. Ct. No. 16CEPR00961)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. Jeffrey Y. Hamilton, Judge.

The Law Offices of Joseph H. Boyd and Joseph H. Boyd for Plaintiff and Appellant.

Whelan Law Group, Walter W. Whelan, Brian D. Whelan, and Lucas C. Whelan for Defendant and Respondent.

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Kenneth R. Boyd (Ken) petitioned to remove his sister, Martha Marsh (Martha), as trustee of a trust their father established years before his death. Following Ken's presentation of the evidence at the bench trial on his petition, the trial court granted

Martha's motion for judgment under Code of Civil Procedure section 631.8.¹ On appeal, Ken contends the trial court erred in excluding evidence concerning a settlement offer Martha made in other litigation involving the trust and Martha's attorney committed misconduct while arguing the motion. Finding no prejudicial error, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

J.H. Boyd (J.H.) had four children—Ken, Louise Autenrieb, Martha, and Joseph D. Boyd, who predeceased J.H. and is survived by his wife Elizabeth and her stepson. J.H. founded J.H. Boyd Enterprises, Inc. (the Corporation) in 1971, and established the J.H. Boyd Living Trust (the Trust) on May 30, 1991.

In August 2011, J.H. named Martha trustee of the Trust, pursuant to a "Second Amended and Restated" Trust Agreement. The Trust's beneficiaries are Ken, Louise, Martha, and Joseph D. Boyd's children. In June 2014, Martha became president of the Corporation. J.H. amended the Trust on July 9, 2014, pursuant to a "Third Amended and Restated Trust Agreement" (the third restatement). On September 10, 2014, the third restatement was amended pursuant to a "First Amendment." The third restatement included a conflict of interest waiver, by which J.H. intended to override any fiduciary duty that might otherwise limit Martha's actions and specifically waived the conflict of interest provisions of Probate Code sections 16002, 16003 and 16004.²

¹ Undesignated statutory references are to the Code of Civil Procedure.

² The third restatement provides in this regard: "The Trustor wishes to discourage a contest of the beneficial and administrative terms of this Trust. Discouraging such a contest is an important Trust purpose. The Trustee may use the Trust funds to pay attorneys and other agents and to pay other costs and expenses to defend any contest of this Trust or any of its provisions, even if the contest does not attack the validity of the Trust, but instead its dispositive or administrative provisions. In authorizing the Trustee to use Trust funds for these purposes, the Trustor intends to override any fiduciary duty that might otherwise constrain the Trustee, including, but not limited to, the duties of loyalty and impartiality and the duty to avoid conflicts of interest under California Probate Code Sections 16002, 16003 and 16004, respectively."

J.H. died on March 24, 2015.

I. The Prior Lawsuits

A. *The Corporation Lawsuit*

In 2015, the Corporation sued Ken and his wife, Susan Boyd, individually and as trustees of the Boyd Trust dated December 23, 1999, in Fresno County Superior Court case No. 15CECG00915 (the Corporation lawsuit). In that action, the Corporation alleged Ken and Susan were in breach of a \$2.5 million promissory note between themselves and the Trust, which was secured by a deed of trust against real property Ken owned.

Ken and Susan subsequently filed a first amended cross-complaint against the Corporation, Martha and her husband, Robert Marsh, and Louise and her husband, Fredrick Autenrieb (the cross-defendants), which alleged 19 causes of action. As pertinent here, the 11th cause of action, which was against Martha and Louise, sought revocation of the “Third Declaration of Trust” on the grounds it was made as the direct result of Martha’s and Louise’s undue influence, and the 14th cause of action, which was against Martha and sought damages for her alleged breach of fiduciary duty as trustee of the Trust.

The cross-defendants subsequently brought a motion for summary judgment or adjudication as to Ken and Susan’s first amended cross-complaint. In November 2016, the Honorable Jeffrey Y. Hamilton denied summary judgment, but granted summary adjudication of causes of action one through five, and 10 through 19.

A court trial was held between May 24 and July 13, 2017, before the Honorable Alan M. Simpson, on the first amended cross-complaints’ remaining causes of action. Judge Simpson issued a statement of decision in which he found in the cross-defendants’ favor. As pertinent here, with respect to accusations that there was an “abuse of authority,” Judge Simpson explained that Ken and Susan “broadened the scope of the evidence supposedly supporting their claims of breach of fiduciary duty, negligence, and

mismanagement to include a wholesale attack on Martha Marsh in her role as the trustee of the [Trust].” Judge Simpson noted that while all of the cross-complaint’s trust claims had been adjudicated against Ken and Susan when Judge Hamilton granted summary adjudication of those claims, Ken and Susan “chose to litigate at trial Martha Marsh’s role as trustee of the [Trust]. Specifically, an effort was made to prove that Martha Marsh breached her fiduciary duty to trust beneficiaries in how she managed the trust and that such conduct warranted the involuntary dissolution of the corporation—apparently on the grounds that she could not be trusted and/or that she had a propensity for being unfair to other shareholders. However, based on all of the evidence which was offered relating to Martha Marsh’s management of the [Trust], including, but not limited to, the accounting of the trust [], this Court finds that Martha Marsh did not breach her fiduciary duty toward any of the trust beneficiaries, and that she did not act with fraud or negligence in her management of any of the trust assets or affairs. These were factual issues that Ken and Susan Boyd sought to prove at trial, but they failed to do so.”

B. *The Kenco Lawsuit*

In August 2015, Kenco Investments, Inc., a California corporation which Ken owned, sued Martha as trustee of the Trust in Fresno County Superior Court case No. 15CECG02521 (the Kenco lawsuit). The complaint contained a single cause of action for “Equitable Relief to Enforce Contract” and alleged the following: (1) Kenco and J.H. jointly owned real property located at 275 South Madera Avenue in Kerman, commonly known as the Boyd Professional Center (the Center), pursuant to a partnership agreement which gave Kenco the right to purchase J.H.’s interest in the Center; (2) J.H. subsequently transferred his interest in the Center to the Trust, but Kenco maintained the right to purchase J.H.’s interest upon his death; and (3) following J.H.’s death, Martha refused to sell the Trust’s interest in the Center to Kenco. Kenco asked the court to force

the sale of the Trust's interest in the Center to Kenco. Martha subsequently filed a cross-complaint for partition of the Center.³

In February 2017, Kenco and Martha agreed to a bifurcated proceeding, with Kenco's single cause of action to be determined first. On April 21, 2017, following a two-day trial which had concluded on February 15, 2017, the trial court issued a ruling in which it found against Kenco on its cause of action to enforce the contract.⁴ The trial court found the parties were co-tenants, and not partners or parties to an enforceable contract.

In December 2017, a court trial was held on Martha's action to exercise her equitable right to partition the Center by public sale.⁵ In February 2018, the trial court issued a statement of decision in which it found that partition by sale was the most equitable remedy and ordered partition by sale. The trial court also granted Martha an equitable offset of \$148,200 for half of the \$950 per month management fees Kenco took for at least 26 years, to be paid to her upon sale of the Center.⁶

II. The Petition to Remove Martha as Trustee

On September 13, 2016, Ken filed a petition to remove Martha as trustee of the Trust and appoint himself as successor trustee. Boyd's petition alleged two causes of action: (1) breach of fiduciary duty, and (2) accounting. The petition alleged Martha breached her fiduciary duty by: (1) failing to communicate with the beneficiaries, assuming exclusive ownership of the Trust properties and depositing Trust monies into

³ According to the third restatement, the Trust's one-half interest in the Center was to be equally distributed to Martha and Louise on J.H.'s death.

⁴ The Honorable Jane A. Cardoza presided over the trial.

⁵ The Honorable Kristi Culver Kapetan presided over the trial.

⁶ The trial court rejected Kenco's contention that an agreement existed authorizing "The Boyd Company" to receive a \$950 per month management fee, as no specific agreement was adduced at trial and no admissible evidence of such an agreement was submitted.

her personal checking account; (2) ignoring communications from Ken and his attorney; (3) proposing “an extreme financial loss” to the Center as a Trust asset by offering “to pay \$1.6 million when the property was worth \$1.35 million”; (4) causing Ken “extreme and unnecessary hardship financial losses” with respect to the sale of the Center by requiring him “to pay \$1.6 million for a property when [it] was worth only \$1.35 million”; and (5) failing to discharge her duties in good faith as required under the Trust. As for the accounting cause of action, Ken asked the court to order Martha to provide, within two weeks, an accounting for all Trust money earned, spent or expended since J.H.’s death.

On April 10, 2018, the first day of trial, Boyd withdrew his request to be appointed successor trustee and asked that the petition be amended to request the appointment of “a third-party neutral, professional fiduciary.”

A. *Motion in Limine Regarding Settlement Discussions*

Martha filed motions in limine, which the trial court considered before testimony was received. Motion in limine No. eight sought to bar settlement discussions in the Kenco lawsuit. Martha noted that Ken alleged in the petition that she breached her fiduciary duty by proposing an extreme financial loss to either the Center or Ken as beneficiary by seeking to sell the Center at a price higher than the Center’s market value. Martha asserted the evidence was barred under Evidence Code section 1152, as the communications took place in the context of settlement proposals to resolve the Kenco lawsuit.

At oral argument on the motion, Ken’s attorney asserted settlement discussions from another case could be used in this case to show Martha breached her duty of loyalty because she did not settle or negotiate on behalf of the Trust only, and instead commingled her personal interest with that of the Trust. Ken’s attorney added that in the settlement offer Martha, acting as trustee, said she would settle the case if her personal cases also were dismissed, which was a conflict of interest.

Martha's attorney responded the petition did not mention the claim that Martha engaged in settlement discussions for her own personal benefit, and this was the first time that issue had been raised. Moreover, the settlement discussions were being used improperly to prove liability, namely, the removal of Martha as trustee. Ken's attorney asserted the additional information was discovered after the petition was filed. The trial court did not find a case Ken's attorney relied on persuasive and told him it would review an on point case, if he could find one.

B. *Trial Testimony*

Martha, certified public accountant Joseph Mattes, and attorney Joseph H. Boyd (attorney Boyd) were the only witnesses who testified at the trial.

1. Martha's Testimony

a. The December 2016 Accounting

Martha, who has a master's degree in accounting, confirmed she submitted an accounting on December 27, 2016. The first request for accounting she received from the beneficiaries was after her father's death in 2015, through attorney Boyd. Martha supplied him with over 12,500 documents because there were two ongoing litigation matters, but she did not prepare them in the same manner as the December 2016 accounting. The documents were submitted as balance sheets and income statements.

On October 20, 2015, attorney Boyd wrote attorney Robert Mallek on behalf of Ken, as beneficiary of the Trust, and requested copies of the Trust's financial statements from 2014 on.⁷ Mallek responded to attorney Boyd's letter on the Trust's behalf, informing him that because the Trust became irrevocable on March 24, 2015, Ken, as a named beneficiary, was not entitled to financial statements or an accounting prior to that

⁷ Although Mallek was J.H.'s attorney while he was living and also represented the Corporation, Martha did not retain Mallek to represent the Trust after her father's death.

date. For the period after that date, the requested financial statements were being prepared, but would not be completed before year end.

On July 15, 2016, attorney Allan R. Frumkin wrote Mallek, stating he understood Mallek was representing Martha as trustee of the “Joseph D. Boyd and Lizbeth L. Boyd Trust,” and asked him to provide financial information. Frumkin also asked for a copy of any conflict of interest waiver Mallek procured from “Mr. Boyd.” Since Martha was not the trustee of the trust listed in the letter, there was some confusion.

On August 29, 2016, attorney Walter W. Whelan, who represented the Trust,⁸ responded to Frumkin’s letter. Whelan stated the documents Ken requested would not be supplied to him as he was no longer a beneficiary of the Trust since he was contesting the validity of the third restatement in contravention of its no contest clause. Whelan further stated many of the records Ken was seeking were included among the over 12,000 pages of documents produced in litigation.⁹

Nevertheless, Martha retained accounting firm K•Coe Isom in October 2016 to perform an accounting from August 3, 2011, the day she was made trustee. This was the first formal accounting Martha did as trustee.¹⁰ Before her father’s death on March 24, 2015, no beneficiary had asked for an accounting and Martha understood the third restatement did not require her to do an accounting unless a beneficiary asked for one.

The accounting showed the value of the Trust property decreased from approximately \$3.5 million in 2011 to approximately \$2.4 million in 2016. The decrease was partially attributable to distributions given to J.H. between 2011 and his death, which

⁸ Whelan also represented Martha personally in the cross-complaint filed against her in the Corporation lawsuit.

⁹ Although the trial court admitted the attorneys’ letters into evidence, the court commented the letters had minimal, if any, relevance, and advised the parties it would give them very little credence.

¹⁰ In December 2016, Judge Kazanjian ordered Martha to perform an accounting. At that time, the accounting was already underway.

exceeded \$750,000. Martha facilitated the transfer of those funds because her father requested them. In addition, \$300,000 of the funds transferred related to J.H.'s divorce. According to the trust instrument, if J.H. wanted to make withdrawals from the trust, whether from income or principal, Martha, as trustee, was required to follow his directions.

When Martha became trustee, she set up a personal account for J.H., into which she transferred Trust money for his personal use. Prior to that, J.H. used the Trust account as an operating account, which was why the accounting showed a lot of outgoing expenses for the years 2011, 2015, and 2016, but little or no expenses in 2012 through 2014. From the time Martha became trustee to her father's death, Martha made payments to him for his comfort, health, maintenance, support and care as allowed for in the operative trust agreement.

In 2011, one of the Trust's assets was J.H.'s residence (the Manor property). Martha did not list the Manor property as an asset of the Trust in accounting for the years 2011 through 2015, but the proceeds of the property's sale were brought in as an asset in the 2016 accounting.¹¹

Martha had conversations with some of the beneficiaries, including members of Ken's family, about the sale of the Manor property. Martha presided over the division of J.H.'s personal property that was in the house following his death. Ken's daughter and Louise also were involved. Martha told them of the need to vacate J.H.'s house so it could be sold. Ken is a licensed real estate broker in California and his partner is his son-in-law, Brian Elsworth. She had a conversation with Elsworth about the sale of J.H.'s

¹¹ The K•Coe Isom report, which was attached to the first account and report, states, in pertinent part: "During May 2016, a residential property located at 733 South Manor Drive, Kerman, California, 93630, was sold, which had previously not been accounted for within the Trust. The property was sold for a gross sales price of \$325,000.00, with the Trust initially receiving \$292,367.08 after closing costs."

house. Elsworth asked her if she was going to list the property with him and Ken. Martha told him that was her intention, but when Ken filed two lawsuits against the Trust, she listed the property with a listing agent, Deborah Brooks of London Properties.

In the accounting, the Center was valued at \$478,160.38 for the years 2011 through 2013. Martha explained this was an estimated value, as no appraisal had been done on the properties until J.H.'s death in 2015. Martha conferred with J.H.'s certified public accountant, Joe Mattes, and K•Coe Isom, who determined the best way to estimate the Center's value was to use its basis until a more current year, when an appraisal could be used to value the property. Martha believed the figure used to estimate the Center's value accurately reflected its fair market value in 2011.

The Trust owned a duplex called the "Dakota property." The accounting listed the value of the "Dakota property" at \$75,000 in 2011, \$95,000 in 2012, \$140,000 in 2013, and \$150,000 in 2014 and 2015. Martha explained K•Coe Isom arrived at these figures by using "some sort of service" to determine the value in those specific years, and then an appraisal was performed, which was used in 2015 and 2016. The property appraisals were prepared by Giomi. The Trust paid for the appraisals; the Corporation did not contribute to the appraisals' cost.

Martha sold the Dakota property in May 2016 for \$135,000, even though Giomi had valued it at \$150,000 in 2015. Martha originally listed the property for \$150,000, but she dropped the price because the market was not strong. When she got the \$135,000 offer, she accepted it. The Trust's cost basis in the Dakota property was \$51,000. Her realtor, Deborah Brooks, told her that property typically was selling at \$125,000 when the sale was made.

Martha sold the Dakota property as part of the process of liquidating assets so she could distribute the balance of the Trust to the beneficiaries. She did not distribute the balance, however, because of Ken's lawsuits against the Trust; lawyers instructed her not to distribute trust assets while the lawsuits were ongoing. She did not notify all of the

beneficiaries that she was selling the property, but according to Martha, she was not required to do so.

Martha had rendered an accounting for the calendar year 2017, which K•Coe Isom prepared, but she had not supplied it to the beneficiaries because none of them requested it. Martha provided the Trust's tax returns to K•Coe Isom to prepare the accountings, but not her father's personal tax returns.

b. The Kenco Lawsuit

Martha confirmed she brought an action as trustee to partition the Center. In doing so, she was trying to protect the beneficiaries' interests and noted the second phase of the action showed Ken misappropriated \$148,200 in funds that should have come into the Trust, which the court ordered as an offset. Martha was seeking a sale by either public auction or private sale, and she hoped to receive the fair market value of the Center or have the Trust actually purchase it. One half of the sales proceeds would go into the Trust and the other half to Kenco, which essentially was Ken, less the monies Ken misappropriated. When asked if she was, at any time, prepared to sell the Trust's interest in the Center to Ken or his company, Martha responded, "At the proper price, yes." Martha added that Ken had a different fair market value than the appraiser's, plus there was the misappropriation of funds.

Ken's attorney asked Martha if she rejected an offer from Ken to sell 50 percent of the Center to him or his company at the fair market value as established by the court unless he dismissed personal litigation against her. Martha's attorney objected on the ground the question sought Ken's hearsay statement regarding the offer made. The trial court sustained the objection. When Martha was asked if she ever represented to anyone other than her own attorney that she would not sell to Ken unless personal litigation against her was dismissed, Martha responded, "I don't recall that."

On July 20, 2015, prior to filing the complaint, Ken sent Martha a letter in which he demanded the Trust sell Kenco the Trust's one-half interest in the Center for

\$675,000, or one-half of the appraised value, pursuant to an agreement Ken had with J.H. to continue to operate the Center pursuant to the terms of their 1979 partnership agreement. Martha told Ken she did not think there was a valid contract forcing the sale and refused Ken's demand. Ken then instituted the Kenco lawsuit. Martha did not agree with the \$675,000 figure. Based on Giomi's appraisal, a half-interest in the Center was worth between \$700,000 and \$800,000.

Martha told Ken she wanted documentation to see if there was a valid contract of which she was unaware. Ken responded that the contract was an old partnership agreement between he and J.H., which dissolved in 1991. Because of Giomi's appraisal and what Giomi told her, she suspected Ken had been misappropriating funds in operating the Center.

Initially, the Whelan Law Group represented the Trust in the Kenco lawsuit. Martha later retained the Wanger Jones Helsley firm to represent the Trust. The Trust was entirely successful in the lawsuit and the trial court awarded an offset of \$148,200 to be paid to the Trust for misappropriated funds. The Trust spent approximately \$200,000 in litigation fees and costs in the Kenco lawsuit. Martha's attorneys filed a motion for attorney fees to recover the entire \$200,000 in fees based on the no contest clause in the third restatement. Martha did not discuss the litigation costs with the beneficiaries. The Center had not yet been sold, but Martha intended to proceed with the sale in the near future.

c. Attorney Fees in the Corporation Lawsuit

In apportioning attorney fees among the cross-defendants in the Corporation lawsuit, Martha engaged in a good faith process of allocating the parts of the litigation that were fairly attributable to defending the Trust or the Trust administration. Martha identified the 11th cause of action for revocation of the trust instrument, the 12th cause of action for intentional misrepresentation, and the 14th cause of action, in which she was sued in her capacity as trustee, as trust-related claims. In addition, there were other

allegations in the cross-complaint bearing on the Trust, such as: (1) paragraph 131, which alleged J.H., as beneficiary of the Trust, relied on false representations of Martha, Louise or Robert Marsh; (2) paragraphs 133 and 143, which alleged J.H. altered the trust instrument to benefit Martha and Louise based on their misrepresentations, to the detriment of Ken and the descendants of Ken's late brother; and (3) assertions Martha breached her fiduciary duty to the Trust and its beneficiaries. Martha arrived at an allocation of \$60,000, which was paid to the Whelan Law Group on October 13, 2015, for its involvement in defending the cross-complaint. The payment was a small fraction of the total litigation expenses incurred in that action. To the extent Martha and Louise were accused of bad conduct individually, their homeowner's insurance policies helped pay the cost of litigation, which was far in excess of the \$60,000 the Trust paid.

To the extent the Corporation was involved in defending claims, Martha, as the Corporation's president, allocated corporate funds to pay those claims. Whelan Law Group represented the Corporation until the cross-complaint was filed in August 2015; after that, the McCormick Barstow firm handled the Corporation's defense, while Whelan Law Group handled the defense of the individual cross-defendants.

In a declaration filed in support of the Corporation's motion for attorney fees relating to indemnification of the individual cross-defendants, Martha stated she reviewed bills from Whelan Law Group and conferred with counsel about them. Martha declared the fees incurred in connection with defending the cross-complaint's non-trust related claims against the individual cross-defendants from August 10, 2015, through December 31, 2017, totaled \$330,703.19. Martha further declared that, as shown in an attached schedule, allocations were made for attorney fees between the Corporation and the Trust "based on the nature of the claims that were 'in play' at different times during the litigation." The attached schedule showed \$330,703.19 of Whelan Law Group's attorney fees was allocated to the Corporation, while the balance of \$131,306.24 was allocated to the Trust.

As shown in “Schedule C-Disbursements” of the December 2017 accounting, the Trust paid the Wanger Jones Helsley firm \$131,387.53 and Whelan Law Group \$146,022.72 in professional expenses from December 8, 2016, to December 31, 2017. Martha believed all of the payments made to both firms were for trust-related activities, and the Trust had been successful to date with respect to the claims made against it at the trial court level, although appeals were pending.

d. The Promissory Note

At some point during Martha’s tenure as trustee, the Corporation purchased “the Ken Boyd note.” According to a promissory note issued on July 10, 2012, the Corporation promised to pay the Trust \$1.5 million with interest from that date at six percent interest per annum on the unpaid principal balance, with principal and interest paid in equal monthly installments of \$20,000. The note does not have a late fee provision or prepayment penalties. The note required compound interest. Martha recently had been made aware of that provision and testified she would have the chief financial officer compound it.

The Corporation was not current on its monthly payments; at J.H.’s direction, it stopped making principal payments on June 6, 2014. Thereafter, the Corporation made interest-only payments, with the exception of a principal payment of approximately \$622,000 in December 2017, which was made because the Corporation refinanced a piece of property and took out additional money to pay down the note. J.H. directed the Corporation to make interest-only payments to ensure the Corporation had sufficient funds to defend lawsuits he anticipated would be waged against it. Martha explained J.H. felt Ken was not going to pay his debts based on a letter he received from Ken in June 2014 which disturbed him.

The Trust, through Martha as trustee, agreed to accept the interest-only payments. Martha understood the interest portion of those payments would be taxable to the Trust and deductible to the Corporation. By accepting the interest-only payments, the Trust

received six percent interest on the higher principal balance, which created an additional \$64,000 in interest income that Martha believed was a benefit to the Trust. There was no discussion about increasing the interest rate or securing the note by a piece of property. Martha did not give either written or verbal notice to the beneficiaries of the decision to accept interest-only payments.

Under the third restatement, Ken was required to pay all debts he or his trust owed the Corporation by May 16, 2018, or he would lose his inheritance under the Trust. According to Martha, Ken or his trust owed the Corporation (1) the \$2.5 million note that was in default, and (2) \$1.5 million of the \$2 million note on which a balloon payment was due on May 15, 2018. At the trial in the Corporation lawsuit, Ken testified he intended to pay those debts. If Ken honored his promise to pay the debts by May 16, 2018, Martha, as president of the Corporation, intended to pay back the balance of the \$1.5 million debt the Corporation owed the Trust. If Ken had paid the \$2.5 million note when it was due in 2014, Martha would have ensured the Corporation repaid the \$1.5 million debt at that time. Martha, as president of the Corporation, intended to fully pay off the remaining balance of the promissory note.

e. The Corporation's Stock Value

The Trust owns shares of stock in the Corporation. Thus, to the extent Martha's efforts served to enhance the Corporation's value, the Trust and its beneficiaries also benefit, as the value of the Trust's assets also increases.

At one point, the Corporation was in settlement negotiations with Elizabeth to purchase her shares at \$277 per share. Elizabeth had threatened to sue and demanded a million dollars for her corporate shares. In response to her settlement demand, the board divided the amount she sought by the number of shares she owned and allowed her to market her shares at that price. The Corporation did not purchase the shares from her at that price.

On August 14, 2014, the board, including Martha, unanimously voted to reset the stock value to \$341.07 per share. In the Corporation lawsuit, however, the trial court found there was a legitimate factual basis, based on the Giomi appraisal and K•Coe Isom report, for the corporate board to set a maximum fair market price for the Corporation's shares at \$157 per share. Martha participated in setting that value in a meeting of the board of directors. The price did not reflect any marketability or minority shareholder discounts.

Martha confirmed that in the 2014, 2015 and 2016 accountings, the class A stock was valued at approximately \$56 per share. K•Coe Isom found this amount to be the fair market value of those shares in the general marketplace. This was less than the \$157 share price, which is what the Corporation might be willing to buy the shares for under certain terms.

In 2011, the Corporation paid for an appraisal to value its stock. The Corporation hired an appraiser to value its properties, and the accounting firm Stoughton Davidson to determine the share value. Martha ordered a valuation report as of the date of J.H.'s death, which was prepared by K•Coe Isom. K•Coe Isom valued the shares, while separate appraisers valued the corporate assets and notes.

The Corporation has two classes of stock—A shares, which are voting shares, and B shares, which are non-voting shares. In 2011, the Trust owned 5,215 class A shares, with an estimated market value of \$84.72 per share. In 2015, the Trust owned 1,443 class A shares, with a total estimated market value of \$81,000, which equates to \$56.13 per share. Martha confirmed the valuations applied minority and marketability discounts. Based on what the appraiser told Martha, the share price decreased because Ken defaulted on the \$2.5 million note on September 15, 2014, which was a substantial corporate asset.

2. Mattes's Testimony

Joseph Mattes prepared J.H.'s personal tax returns. Mattes did not prepare tax returns for the Trust while J.H. was alive, however, because under tax law, a trustor of a revocable trust includes the trust information on his personal return. Therefore, any assets or income in the Trust's name would be represented on the individual return.

Mattes knew that Ken managed the Center from 2011 to 2016, and that it was a joint tenancy, with half of the complex owned by the Trust and half by Ken's company, Kenco. J.H.'s tax returns reported the income that was received by J.H.'s agent, which was Kenco. Thus, Schedule E of J.H.'s 2011 return listed \$85,454 in rental income for his share of the rent received, which information the Center's manager, Ken, provided to Mattes. The amount distributed to the Trust was variable and was not exactly one-half of the net income. Mattes was the tax preparer for the Trust and Corporation until J.H.'s death in 2015. During that time, Ken never complained that Mattes had a conflict of interest doing accounting work for the different entities.

3. Attorney Boyd's Testimony

Attorney Boyd, a licensed California attorney, was counsel in the Kenco lawsuit and present at all settlement discussions. When asked if it was his opinion there was really only one barrier to settlement, the trial court sustained Martha's attorney's relevancy and Evidence Code section 352 objections. When asked if, in settlement discussions, the case ever got to the point where it nearly settled, Martha's attorney objected under Evidence Code section 1152. Ken's attorney stated he believed the discussions were admissible on whether the trustee performed her duty of loyalty to the beneficiaries and had a conflict of interest, and confirmed attorney Boyd represented a party opposed to Martha in the Kenco lawsuit. The trial court did not find the issue relevant in that context, and added there may be some ethical dilemmas trying to elicit such testimony.

Ken's attorney made the following offer of proof: "[T]he case was ready to settle except for one thing. And that was that Ms. Marsh, who was trustee of the trust[,] demanded that she be released from all personal litigation against her in opposition to what was in the best interest of the trust. That would be the relevance." Ken's attorney confirmed attorney Boyd's testimony would be that Martha said, "through counsel" words to the effect "if you release me personally." After the offer of proof, Martha's attorney wanted to make clear he was still asserting the Evidence Code section 1152 objection.

Attorney Boyd confirmed the offer of proof was accurate. When asked to explain to the court "what transpired," attorney Boyd responded: "The first offer that came from Ms. Marsh's attorney was an offer to either buy or sell the 50 percent interest in the Boyd professional center at a value [of] \$800,000. Which was \$100,000 greater than the appraisal that she had provided to us of the building. [¶] Later in settlement discussions it got to a point where it appeared that a sale would occur; wherein, my client would be able to purchase the trust—50 percent interest in the property. [¶] There's one—one sticking point, though, and that sticking point was that Ms. Marsh had to be released personally from the other lawsuits in that. [¶] I specifically remember discussing saying, You can't do that. That's—that violates your fiduciary duty, and that sort of made a sticking point. [¶] I believe that was in January of last year, and then approximately a year later, shortly before the trial in that case had discussions again with Ms. Marsh's attorney raising the possibility of settlement." Martha's attorney objected "to that line as well" on the ground it went beyond the question. The trial court sustained the objection.

Attorney Boyd then identified a January 2017 email from M. Troy Hazelton, who was the mediator in the Kenco lawsuit.¹² Martha's attorney objected to "any inquiry

¹² The email from Hazelton, dated January 18, 2017, is addressed to Mr. Frumkin and Mr. Toole. Hazelton stated he was the settlement officer in the Kenco lawsuit, and "[w]hen we left the MSC, the parties were close to a settlement, less a couple of issues—

about the content of this communication from mediator relating to a mediation he was presiding over,” stating there were Evidence Code sections that preclude inquiry into mediation discussions. Ken’s attorney responded the email did not really discuss mediation, but mentioned the release language, which supported attorney Boyd’s testimony. Martha’s attorney argued the email was covered by the mediation privilege. The trial court sustained the objection pursuant to Evidence Code section 1119 and *Wimsatt v. Superior Court* (2007) 152 Cal.App.4th 137 (*Wimsatt*).

On cross-examination, attorney Boyd confirmed the Wanger firm represented the Trust in the Kenco lawsuit, and he dealt primarily with lawyer Patrick Toole. Attorney Boyd denied that one of the sticking points in the settlement discussions was that Kenco did not want the payment to go to Martha and Louise consistent with the provisions of the first amendment to the third restatement. Attorney Boyd admitted, however, a “topic of discussion” was a demand that the settlement would not be paid to just Martha and Louise, but instead would be distributed to all of the beneficiaries.

Attorney Boyd confirmed Toole sent him a letter on August 2, 2016, in connection with settlement discussions in the Kenco lawsuit. When Martha’s attorney attempted to move the letter into evidence, the trial court sustained Ken’s attorney’s hearsay objection. Martha’s attorney argued it was admissible as a prior inconsistent statement, since Ken’s attorney had offered Toole’s statements and settlement communications. The trial court stated it had not taken any evidence so far on settlement. Martha’s attorney thought some evidence had “leaked in,” but then stated he had no further questions.

most notably, the release language. It was my understanding Mr. Toole would circulate a written agreement (or at least proposed release language). Has this been done?” Hazelton also asked if there were any areas of disagreement the parties would like assistance in resolving and stated he was available to meet with them.

C. *The Motion for Judgment under section 631.8*

After Ken's attorney rested, Martha's attorney stated he wanted to make a motion under section 631.8 and they had filed a brief on the issue. In the brief, Martha argued Ken failed to meet his evidentiary burden on all of his claims. Martha specifically asserted: (1) while Ken insinuated she was wrong in failing to notify the beneficiaries before selling J.H.'s residence, she was not required to do so; and (2) while Ken attempts to create an issue out of the fact that Martha serves concurrently as president of the Corporation and trustee of the Trust, J.H. clearly intended to place Martha in both roles, specifically waived any apparent conflict and Martha dutifully carried out her obligations to her father and acted, at all times, according to his directives.

Ken's attorney asserted Ken was making contentions other than those raised in the brief, namely: (1) Martha's failure to perform an accounting; (2) her conflict of interest regarding the Center; and (3) comingling her individual interest with the Trust's interests. Ken's attorney did not recall evidence that J.H. intended to place Martha in the position of president, chairman of the board and majority shareholder of the Corporation, as the Trust's provisions do not necessarily put her in that position. Ken's attorney further argued there was an actual breach of trust with respect to the \$1.5 million note payable by the Corporation to the Trust. He asserted the decision to make interest-only payments was an unenforceable oral modification to the note; by modifying the note, Martha removed the note's maturity date, which meant the Corporation could continue to pay whatever it wanted in perpetuity; and there was no benefit to the Trust to accept interest-only payments. Ken's attorney claimed this showed Martha's conflict of interest and that she could not continue as trustee, and at least overcame "the burden to defeat this motion under section 631.8."

Martha's attorney asserted the third restatement set forth the standard for breach of trust, namely, that a trustee is not liable for any mistake or error in judgment in administering the Trust "except for a breach of trust committed intentionally with gross

negligence and bad faith or with reckless disregard to the interest of the beneficiaries,” and that standard had not been met. Martha’s attorney stated it had been suggested that if Trust resources were used to benefit the Corporation, that was in itself a breach of Martha’s duties to the beneficiaries, but the evidence showed if the Corporation benefited, so did the Trust. With respect to the \$1.5 million note, Martha’s actions benefited the Trust and its beneficiaries, as the interest-only payment arrangement was done with the understanding Ken would pay his debt on time and the Corporation would pay the Trust. Moreover, there was no evidence of self-dealing and nothing to show gross negligence or intentional misconduct. Martha’s attorney argued the fact that Martha stood her ground in the Kenco lawsuit could not be contorted into a breach of fiduciary duty or a basis for removing her as trustee. He claimed Ken had not made a showing sufficient to remove Martha as trustee and asked the court to grant the motion.

Ken’s attorney addressed “some of the misstatements of the evidence and misstatement of the facts” that Martha’s attorney made. He argued Martha’s use of trust funds to pay for the Kenco lawsuit was a breach of her fiduciary duty because money that would go to every beneficiary was used to protect a benefit that went only to Martha, as the Trust calls for the 50 percent interest in the Center to go to Martha and Louise, and she did not give notice to the beneficiaries or ask their permission to use Trust money to fund the litigation. Ken’s attorney asserted “[t]he evidence will show” Martha mismanaged the payments of all the attorney fees and used Trust money to pay attorney fees for her own personal litigation.

The trial court granted the motion. The trial court noted there were two causes of action—breach of fiduciary duty and accounting. In terms of the accounting claim, the trial court found the cause of action had no merit because the accounting that was sought in the prayer had been performed. The trial court therefore granted judgment on that cause of action.

With respect to the breach of fiduciary duty claim, the trial court found the accountant to be credible, but his testimony was “not very probative one way or the other.” The trial court found Martha “to be credible, honest, forthright,” and that she had not “in any way attempted in any malicious manner to harm the trust or the trust’s beneficiaries.” The trial court, recognizing that Ken had invited it to take judicial notice of all the case files that dealt with these parties,¹³ “note[d] that this particular Court has had multiple cases involving Ken Boyd, part of them are regarding this trust and the lawsuits that have surrounded this trust. I think in light of all of those various suits, the actions that Ms. Marsh has taken to attempt to fend off a lot of that litigation, most of which in the Court’s recollection, I can’t be sure until I look, but most of them Ken Boyd has lost, if not all of them. [¶] Her actions were understandable and taken in good faith. I find not only did the Petitioner not meet their burden, it is as close to a completely meritless cause of action as I’ve seen in a long time. 631.8 motion is granted.”

DISCUSSION

Section 631.8 authorizes a party in a nonjury trial to move for judgment after the opposing party has completed its presentation of evidence. Here, Martha moved for judgment after Ken finished presenting evidence in his case-in-chief. When a motion for judgment has been made, “[t]he court as trier of the facts shall weigh the evidence and may render a judgment in favor of the moving party” or, alternatively, “may decline to

¹³ At trial, Ken’s attorney stated he did not object to the court taking judicial notice of the entire civil file in the Corporation lawsuit. Accordingly, the trial court took judicial notice of its own files, rulings and statements of decision pursuant to Evidence Code section 452. Ken’s attorney later stated he had “no objection to the court taking judicial notice of all files filed by these parties in this county.” When attorney Boyd asked the trial court whether it was accepting judicial notice of every document in every case, the court responded it was not going to read every document, but “to the extent you all reference an order of another Court within the Fresno County Superior Court, where your family has more litigation than I think any other family in Fresno County, yes, I’ll look at it as long as it’s referenced here.”

render any judgment until the close of all the evidence.” (§ 631.8, subd. (a).) If a judgment is rendered, the court is required to issue a statement of decision. (*Ibid.*)

Where a defendant moves for judgment under section 631.8, the statute enables the trial court, “ ‘when it finds at the completion of plaintiff’s case that the evidence does not justify requiring the defense to produce evidence, to weigh evidence and make findings of fact.’ [Citation.] Under the statute, a court acting as trier of fact may enter judgment in favor of the defendant if the court concludes that the plaintiff failed to sustain its burden of proof. [Citation.] In making the ruling, the trial court assesses witness credibility and resolves conflicts in the evidence.” (*People ex rel. Dept. of Motor Vehicles v. Cars 4 Causes* (2006) 139 Cal.App.4th 1006, 1012.) Since “ ‘ “the trial court evaluates the evidence as a trier of fact, it may refuse to believe some witnesses while crediting the testimony of others.” ’ ” (*Orange County Water Dist. v. MAG Aerospace Industries, Inc.* (2017) 12 Cal.App.5th 229, 239 (*Orange County Water Dist.*)).

When a trial court issues a judgment pursuant to section 631.8, the standards of appellate review are the same as if the court had rendered a judgment after a completed bench trial. (*Orange County Water Dist., supra*, 12 Cal.App.5th at p. 239.) The trial court’s findings of fact are reviewed under the substantial evidence standard and its determinations of questions of law are subject to independent review. (*Id.* at p. 240.)

Although section 631.8, subdivision (a) required a statement of decision, the record does not show, and Ken does not contend, that one was ever requested. Instead, the trial court issued its ruling orally at the hearing on the motion. Given the failure to request a statement of decision and Ken’s failure to address the statement of decision issue on appeal, we deem the statement waived. As a result, we assume the trial court made all findings necessary to support its judgment and indulge all presumptions in favor of its order. (*Tusher v. Gabrielson* (1998) 68 Cal.App.4th 131, 140.)

Here, Ken does not challenge the trial court’s finding he failed to satisfy his burden of showing that Martha breached her fiduciary duty. Instead, he contends: (1) the

trial court erred in excluding evidence of settlement discussions that occurred during the mandatory settlement conference in the Kenco lawsuit, which he claims shows Martha breached her fiduciary duty as a matter of law; and (2) Martha's attorney committed misconduct during argument on the 631.8 motion, which compels reversal.¹⁴

I. Exclusion of Evidence

Ken contends the trial court improperly excluded evidence that Martha, during the mandatory settlement conference negotiations in the Kenco lawsuit, communicated that she would agree to settle the Kenco lawsuit, and allow Ken to purchase the Center at fair market value, only if he would release her individually from other cases. He argues the trial court wrongfully excluded the evidence under Evidence Code section 1119 and *Wimsatt, supra*, 152 Cal.App.4th 137 as “communications made during a mandatory settlement conference are not afforded the same protections of privilege and confidentiality normally given to those in mediation.” Ken claims Martha's refusal to settle unless the lawsuits against her were dismissed is “clear evidence” she breached her fiduciary duties as trustee by comingling her personal interests with those of the Trust to gain a personal advantage.

We review a challenge to the exclusion of evidence by the trial court under the abuse of discretion standard of review. (*Saxena v. Goffney* (2008) 159 Cal.App.4th 316, 332 (*Saxena*).) “The court's ‘discretion is only abused where there is a clear showing [it] exceeded the bounds of reason, all of the circumstances being considered.’” [(*People ex rel. Lockyer v. Sun Pacific Farming Co.* (2000) 77 Cal.App.4th 619,] 640.) Even where a trial court improperly excludes evidence, the error does not require reversal of

¹⁴ We note that in the statement of facts, Ken asserts it was error for the trial court to grant Martha's motion in limine precluding him from seeking to remove her as trustee based on her acts or omissions pursuant to J.H.'s written directions during his lifetime, while the Trust remained revocable. Ken, however, failed to support this assertion with reasoned argument and citations to authority. Accordingly, we treat the point as waived. (*Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal.App.4th 939, 956.)

the judgment unless the error resulted in a miscarriage of justice. (Cal. Const., art. VI, § 13.) [This means the party challenging the evidentiary ruling] has the burden to demonstrate it is reasonably probable a more favorable result would have been reached absent the error. (§ 475; *Tudor Ranches, Inc. v. State Comp. Ins. Fund* (1998) 65 Cal.App.4th 1422, 1431–1432 (*Tudor Ranches*).)” (*Saxena, supra*, at p. 332.)

Ken is correct that mandatory settlement conferences provided for in California Rules of Court, rule 3.1380, are exempt from the mediation confidentiality statutes. (Evid. Code, § 1117, subd. (b)(2).)¹⁵ Discussions during such conferences, however, may be inadmissible under Evidence Code section 1152, subdivision (a), which specifically prohibits evidence of settlement statements to prove liability.¹⁶ Ken contends Evidence Code section 1152 does not apply here because he was using Martha’s settlement offer, not to show that she has any liability in either case, but instead to show she “would gladly jeopardize the interests of the J.H. Boyd Trust to ensure that her personal liabilities were removed[,]” which was a “direct and willing breach of her fiduciary duty of loyalty to the J.H. Boyd Trust.” While Martha asserts the settlement offer made by her attorney was hearsay, Ken responds that it is admissible as a party admission, citing a litany of such exceptions to the hearsay rule.

¹⁵ California’s mediation confidentiality statutes provide that “[n]o evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation ... is admissible or subject to discovery” (Evid. Code, § 1119, subd. (a).) This prohibition reaches “[a]ll communications, negotiations or settlement discussions by and between participants in the course of a mediation” (Evid. Code, § 1119, subd. (c).)

¹⁶ Evidence Code section 1152, subdivision (a) provides: “Evidence that a person has, in compromise or from humanitarian motives, furnished or offered or promised to furnish money or any other thing, act, or service to another who has sustained or will sustain or claims that he or she has sustained or will sustain loss or damage, as well as any conduct or statements made in negotiation thereof, is inadmissible to prove his or her liability for the loss or damage or any part of it.”

We need not decide whether the trial court abused its discretion in excluding the evidence, because even if it erred, Ken has not shown prejudice, i.e. that it is reasonably probable a more favorable result would have been reached absent the error. The evidence Ken intended to offer was attorney Boyd's testimony that there was one "sticking point" in the settlement discussions, namely, that Martha had to be released personally from the other lawsuits. Hazelton's email, however, showed that there were other unresolved issues. Moreover, attorney Boyd confirmed the parties had discussed a demand that the settlement be paid, not just to Martha and Louise as provided under the Trust, but to all the beneficiaries. The mere assertion that Martha demanded to be personally released from other litigation does not necessarily show she was acting contrary to the interest of the other beneficiaries, as it is unknown what litigation Martha was demanding to be released from and the value of that litigation in contrast to the remainder of the settlement offer.

In addition, it is not reasonably likely the trial court would have granted Ken the remedy he sought here, namely, removal of Martha as trustee, based on the settlement offer given its other findings. Probate Code section 15642, subdivision (b) sets forth the statutory grounds for removal of a trustee by the court, which include where the trustee has committed a breach of trust. The decision whether to remove a trustee, however, "rests largely in the discretion of the trial court." (*Estate of Bixby* (1961) 55 Cal.2d 819, 826.) Thus, even if the trial court found Martha committed a breach of trust by demanding Ken personally release her from other litigation, it was not required to remove her as trustee.¹⁷ As the trial court found the actions Martha took to "attempt to fend off" the multiple cases involving Ken were "understandable and taken in good faith," it was

¹⁷ Indeed, where, as here, J.H. as trustor specifically named Martha as trustee, it is well settled that a "named trustee will be removed only for extreme grounds, such as incapacity, dishonesty, or lack of the qualifications necessary to administer the trust." (*Copley v. Copley* (1981) 126 Cal.App.3d 248, 287.)

not likely it would find Martha failed to act in good faith in refusing to settle litigation on which she ultimately prevailed.

II. Improper Argument

Ken contends Martha's attorney committed misconduct by misstating facts and misleading the trial court in his argument on the section 631.8 motion. Ken points to statements the attorney made which he argues improperly (1) assumed facts not in evidence and invited the trial court, as the trier of fact, to speculate as to unsupported inferences, (2) suggested to the trial court that it should be guided by the judgment or verdict in another case, (3) appealed to the trial court's passion or prejudice, and (4) attempted to prejudice the trial court by vilifying him.

Ken complains about the following: (1) a statement in Martha's brief on the section 631.8 motion that "J.H. Boyd intended to place Trustee in both roles," which he claims is not supported by the evidence; (2) statements accusing Ken of not paying his debts [the reduced share value "was a direct result of the litigation threat coupled with Ken Boyd's inexcusable refusal to pay his debt to the corporation"; "if, you know, Ken Boyd would just pay up his bills, he would benefit from them"]; (3) a statement, which he claims is unsupported by the evidence, that by holding back the principal payments on the note, "the trust earns a 6 percent rate of return, which is, frankly, higher than the market rate"; (4) argument that the interest-only payment arrangement was made with the understanding Ken would pay back his debt on time, "[b]ut that hasn't happened because Ken Boyd, a very wealthy man, chose not to pay back"; (5) asserting that from the litigation Ken engendered and his failure to show up at trial, yet still being involved by orchestrating Mattes's appearance at trial, "you get the flavor after all this litigation, that all this is a spiteful, vengeful act of inflicting, you know, stress and agony on Martha Marsh"; (6) arguing "I think the big problem is Ken Boyd still is stinging from the fact that daddy didn't give him his rightful share, and daddy didn't cut him a break in letting him walk away from the large loans that he took out. And that's [f]rankly, what this

litigation is all about”; and (7) in addressing the contention that Martha wasted \$200,000 of the Trust assets “pursuing” the Kenco lawsuit, arguing “[s]he didn’t pursue it. She stood her ground against a bully that was trying to jam something down her throat.”

Ken did not object to any of these comments or statements below. “It is settled that, following a jury trial, a claim of misconduct is not cognizable on appeal absent a timely objection if an objection and admonition would have cured the harm.” (*People v. Scott* (1997) 15 Cal.4th 1188, 1217 (*Scott*); *Regalado v. Callaghan* (2016) 3 Cal.App.5th 582, 598 [“To preserve a claim of attorney misconduct for appeal, a timely and proper objection must have been made at trial; otherwise, the claim is forfeited.”].) In a bench trial, the same rule applies with some modification since there is no jury to admonish. Absent a timely objection, a claim of attorney misconduct is not cognizable on appeal following a court trial if an objection would have cured the harm. (*Scott, supra*, at p. 1217.) Even if the attorney engages in misconduct and there is a timely objection, there is no jury to mislead and it is “very unlikely the misconduct would have had a significant effect on a trial judge.” (*Ibid.*) Ken’s failure to object below forfeits his contention Martha’s attorney’s misconduct justifies reversal of the judgment.

Even were we to reach the issue, we presume the trial court disregarded any improper argument. (See, e.g., *Williams v. Illinois* (2012) 567 U.S. 50, 69-70 [“There is a ‘well-established presumption’ that ‘the judge [has] adhered to basic rules of procedure’ when the judge is acting as a factfinder.”]; *Harris v. Rivera* (1981) 454 U.S. 339, 346 [“In bench trials, judges routinely hear inadmissible evidence that they are presumed to ignore when making decisions.”].) While Ken contends the trial court’s comments in ruling on the motion show it ignored the facts of the case and instead looked to the parties’ litigation history, the trial court found, based on Martha’s testimony, that she had not attempted to harm the Trust or its beneficiaries “in any malicious manner.” The trial court looked to the litigation history, which was in evidence by the express agreement of Ken’s attorney, to find that Martha’s actions were understandable and taken in good faith.

There is nothing to suggest the trial court was prejudiced by improper comments by Martha's counsel.

DISPOSITION

The judgment is affirmed. Respondent is awarded her costs on appeal.

DE SANTOS, J.

WE CONCUR:

PEÑA, Acting P.J.

SMITH, J.